AK Translogic Sdn Bhd v Kausar Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–1823 OF 2005
MARY LIM J
9 AUGUST 2010

Contract — Breach — Subcontract for work done and materials supplied — Whether defendant's failure to pay was breach — Whether subcontract was turnkey contract — Whether plaintiff proven that it met with standards of performance — Whether plaintiff entitled to stop work — Whether plaintiff completed substantial work for which it was entitled to payment

On 6 March 2002, MARA awarded Kausar Corp Sdn Bhd ('the defendant') a project in Malacca that was comprised of several scopes. AK Translogic Sdn Bhd ('the plaintiff') tendered to carry out that part of the project which concerned the supplying, assembling, testing and commissioning of an IT system and the supplying, assembling, testing and commissioning of the fiber accessories and the rack and internal skirting ('the subcontract'). The defendant accepted the plaintiff's quotation for the subcontract by way of its letter dated 12 April 2002. Although there was no formal contract between the parties, the letter of award from the defendant specified that the plaintiff was to complete its part of the project by 22 September 2003 for the sum of RM13,558,556. The plaintiff alleged that as of December 2004, it had completed work to the value of RM11,021,241.53 but it was only paid RM7,699,27908. The plaintiff further claimed that despite repeated claims for the payment of the balance sum of RM3,321,962.45, the defendant failed to settle the outstanding sum. The plaintiff had thereafter stopped work and instituted the present action for the balance sum. It was the plaintiff's case that it had not been fully paid for work completed to the best of its abilities. In order to prove that it had met the required standards of the subcontract the plaintiff relied on the defendant's own documents, namely the health check review report ('the HCRR'), *Laporan Kemajuan Skop F* ('the progress report'), the defendant's letters to MARA and the job scope prepared by the ICT department of Dulang Corp Sdn Bhd ('Dulang'), the company that allegedly took over the plaintiff's work. In its defence the defendant claimed that the work done was not only late but defective and requiring remedial work. The defendant thus filed a counterclaim for costs for such remedial work and related losses but this counterclaim was subsequently withdrawn with no costs. The defendant also submitted that the subcontract was in fact a turnkey contract because MARA had appointed the defendant as a turnkey contractor for the project and that the plaintiff was appointed on a similar understanding. In effect the defendant was of the view that since the plaintiff had not

completed performance of the entire works under the subcontract it was not entitled to its claim. The plaintiff urged the court to disregard the issue of whether the subcontract was a turnkey contract because it was never pleaded. Alternatively the plaintiff submitted that it was only in charge of a part of the project and that nowhere in the letter of award was it specified that the subcontract was a turnkey contract.

Held, allowing the plaintiff's claim with costs:

(1) The court found that the issue of whether the subcontract was a turnkey contract had been pleaded by the defendant indirectly in its defence. However, in view of the significance and the implications of a turnkey contract, there had to be clear evidence of that understanding or intention through an express or specific provision to this effect. In MARA's letter of award to the defendant and the terms of the agreement there were specific references to the arrangement between the parties as a turnkey contract. However, there was a conspicuous absence of an express description of the subcontract as a turnkey contract. The letter of award from the defendant to the plaintiff specifically stated that the plaintiff was to perform and complete the subcontract and made reference to MARA's requirements but that reference was insufficient to render the subcontract equal to a turnkey contract with its meaning and far reaching implications. The court also found that the same held true when construing whether the subcontract was an entire contract. In this case, the plaintiff was paid according to the progress of the works and the subcontract was divisible with payments to the plaintiff not dependant on complete performance by the plaintiff (see paras 7–9).

(2) Despite a lack of a formal contract between the plaintiff and the defendant, there were sufficient details in the letter of award of the standards of performance that the plaintiff was expected to meet. The burden of proving that these standards had been met lay with the plaintiff. In the reports and letters relied upon by the plaintiff to prove its case the plaintiff's completed work was described as either 'successfully implemented' or completed to the level of 95.5% or 94.4%. From these contemporaneous documents it was found that the plaintiff had performed to the standards expected in the subcontract. As such the defendant's allegations that the plaintiff had failed to carry out the works with due diligence and failed to comply with the expected requirements, and that it had called upon the plaintiff to remedy the same could not stand. Further, as the defendant was the turnkey contractor it was responsible for ensuring that the IT system met with user requirements, and the unsuitability of the system and the attendant problems could not be assigned to the plaintiff. In addition, even if the contract was an entire contract, the plaintiff had completed substantial work to which it was entitled to payment (see paras 10–11, 13–14, 27 & 29).

(3) The defendant's submission that it had orally terminated the subcontract had to be rejected as there was no record or evidence of such termination. The defendant's own conduct did not support this contention. In contrast the defendant's failure to pay despite being urged by MARA and the many requests of the plaintiff was a failure to perform as agreed under the subcontract. That failure or refusal to pay was an act of repudiation that would entitle the plaintiff as the innocent party to either insist on the performance of the contract or to terminate the contract and the plaintiff chose to terminate the contract (see paras 30–31).

(4) From the evidence it was clear the plaintiff's claim for RM3,321,962.45 had been proved on a balance of probabilities. The deductions made by the defendant arising from the issue of quality of performance or defective performance did not arise (see paras 35–36).

[Bahasa Malaysia summary

Pada 6 Mac 2002, MARA mengawardkan Kausar Corp Sdn Bhd ('defendan') projek di Melaka yang mengandungi beberapa skop. AK Translogic Sdn Bhd ('plaintif') menender untuk menjalankan bahagian projek tersebut yang berkaitan membekal, mengumpul, menguji dan melengkapkan sistem IT dan membekalkan, mengumpul, menguji dan melengkapkan aksesori fiber dan rak dan 'internal skirting' ('subkontrak'). Defendan menerima sebut harga untuk subkontrak melalui suratnya 12 April 2002. Walaupun tidak terdapat kontrak rasmi di antara pihak-pihak, surat award daripada defendan menyatakan bahawa plaintif hendaklah menyiapkan bahagian projeknya pada 22 September 2003 untuk sejumlah RM13,558,556. Plaintif mendakwa bahawa mulai Disember 2004, ia telah menyiapkan kerja bernilai RM11,021,241.53 tetapi hanya dibayar sebanyak RM7,699,27908. Plaintif selanjutnya menuntut bahawa walaupun tuntutan berulang kali untuk bayaran baki jumlah sebanyak RM3,321,962.45, defendan gagal untuk menyelesaikan jumlah tertunggak tersebut. Plaintif kemudiannya berhenti kerja dan memulakan tindakan ini untuk jumlah baki wang. Ia adalah kes plaintif bahawa ia tidak dibayar sepenuhnya untuk kerja yang disiapkan dengan kebolehannya terbaiknya. Untuk membuktikan yang ia telah memenuhi standard yang dikehendaki oleh subkontrak plaintif bergantung ke atas dokumen-dokumen defendan sendiri, terutamanya 'health check review report' ('HCRR'), Laporan Kemajuan Skop F ('laporan kemajuan'), surat-surat defendan kepada MARA dan skop kerja yang disediakan oleh jabatan ICT Dulang Corp Sdn Bhd ('Dulang'), syarikat yang didakwa mengambilalih kerja plaintif. Dalam pembelaannya defendan mendakwa bahawa kerja yang dilakukan bukan sahaja lambat tetapi cacat dan memerlukan kerja pemulihan. Defendan oleh itu memfailkan tuntutan balas untuk kos bagi kerja pemulihan sedemikian dan kerugian-kerugian yang berkaitan tetapi tuntutan balas ini kemudiannya ditarik balik tanpa kos. Defendan juga berhujah bahawa subkontrak sebenarnya adalah kontrak serah

kunci kerana MARA telah melantik defendan sebagai kontraktor serah kunci untuk projek tersebut dan bahawa plaintif dilantik atas pemahaman yang sama. Pada hakikatnya defendan berpendapat bahawa memandangkan plaintif tidak menyiapkan pelaksanaan keseluruhan kerja-kerja di bawah subkontrak ia tidak berhak kepada tuntutannya. Plaintif mendesak mahkamah untuk tidak mengendahkan isu sama ada subkontrak adalah kontrak serah kunci kerana ia tidak pernah diplid. Secara alternatif plaintif berhujah bahawa ia hanya bertanggungjawab sebahagian daripada projek tersebut dan tidak terdapat di mana-mana dalam surat award menyatakan bahawa subkontrak adalah kontrak serah kunci.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Mahkamah mendapati bahawa isu sama ada subkontrak adalah kontrak serah kunci telah diplidkan oleh defendan secara terus dalam pembelaannya. Walau bagaimanapun, mengambilkira kepentingan dan implikasi kontrak serah kunci, mesti terdapat keterangan jelas pemahaman atau niat tersebut melalui peruntukan nyata dan spesifik. Dalam surat award MARA kepada defendan dan terma-terma perjanjian terdapat rujukan spesifik kepada perjanjian di antara pihak-pihak sebagai kontrak serah kunci. Walau bagaimanapun, terdapat ketiadaan yang menonjol deskripsi nyata subkontrak sebagai kontrak serah kunci. Surat award daripada defendan kepada plaintif menyatakan secara spesifik bahawa plaintif mestilah melaksanakan dan menyiapkan subkontrak tersebut dan membuat rujukan kepada kehendak-kehendak MARA tetapi rujukan tersebut adalah tidak mencukupi untuk menyebabkan subkontrak tersebut sama kepada kontrak serah kunci dengan maksudnya dan implikasi yang meluas. Mahkamah juga mendapati bahawa ianya adalah benar apabila mentafsir sama ada subkontrak adalah kontrak keseluruhannya. Dalam kes ini, plaintif dibayar mengikut kepada kemajuan kerja-kerja dan subkontrak boleh dibahagikan dengan bayaran-bayaran kepada plaintif tidak bergantung atas pelaksanaan penuh oleh plaintif (lihat perenggan 7–9).

(2) Walaupun tidak ada kontrak rasmi di antara plaintif dan defendan, terdapat butir-butir yang mencukupi dalam surat award standard pelaksanaan yang patut dipenuhi oleh plaintif. Beban membuktikan standard ini telah dipenuhi ia ditanggung oleh plaintif. Dalam laporan-laporan dan surat-surat yang digunakan oleh plaintif untuk membuktikan kesnya kerja siap plaintif dinyatakan sama ada sebagai 'successfully implemented' atau siap hingga tahap 95.5% atau 94.4%. Daripada dokumen-dokumen semasa ini ia didapati bahawa plaintif telah melaksanakan kerja kepada standard yang dikehendaki dalam subkontrak. Oleh itu dakwaan-dakwaan defendan bahawa plaintif telah gagal untuk menjalankan kerja-kerja dengan ketekunan dan gagal untuk memenuhi kehendak-kehendak yang diharapkan, dan ia telah meminta

plaintif untuk meremedikannya tidak dapat bertahan. Selanjutnya, memandangkan defendan adalah kontraktor serah kunci ia bertanggungjawab untuk memastikan bahawa sistem IT dipenuhi dengan kehendak pengguna, dan ketaksesuaian sistem tersebut dan masalah-masalah pembantu tidak boleh diserahhakkan kepada plaintif. Selanjutnya, walaupun kontrak adalah kontrak keseluruhan, plaintif telah menyiapkan kerja dengan substansial di mana ia berhak kepada bayaran (lihat perenggan 10–11, 13–14, 27 & 29).

(3) Hujahan defendan bahawa ia telah secara lisan menamatkan subkontrak tersebut terpaksa ditolak memandangkan tidak ada rekod atau keterangan mengenai penamatan sedemikian. Tingkah laku defendan sendiri tidak menyokong hujahan ini. Berbanding dengan kegagalan defendan untuk membayar meskipun didesak oleh MARA dan permintaan-permintaan plaintif yang banyak adalah kegagalan untuk melaksanakan seperti yang dipersetujui di bawah subkontrak. Kegagalan atau penolakan untuk membayar adalah tindakan penolakan yang membuat plaintif berhak sebagai pihak yang tidak bersalah sama ada untuk mendesak pelaksanaan kontrak atau untuk menamatkan kontrak dan plaintif memilih untuk menamatkan kontrak tersebut (lihat perenggan 30–31).

(4) Daripada keterangan ia adalah jelas tuntutan plaintif untuk sejumlah RM3,321,962.45 telah dibuktikan atas imbangan kebarangkalian. Pemotongan yang dibuat oleh defendan berbangkit daripada isu kualiti pelaksanaan atau pelaksanaan cacat tidak berbangkit (lihat perenggan 35–36).]

Notes

For cases on breach of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

Cases referred to

Bolton v Mahadeva [1972] WLR 1009, CA (refd)

Guan Soon Tin Mining Co v Ampang Estate Ltd [1973] 1 MLJ 25, FC (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1997] 1 CLJ Supp 448, HC (refd)

KP Kunchi Raman v Goh Brothers Sdn Bhd [1978] 1 MLJ 89 (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17, CA (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)

Viking Grain Storage Ltd v TH White Installations Ltd & TH White Ltd [1985] 3 ConLR 52 (refd)

Sivakumar Nadarajah (Rewathy Krishnan Kutty with him) (Rastam Singa & Co) for the plaintiff.
Ashok Kumar Mahadev Ranai (Shannon Rajan with him) (Skrine) for the defendant.

Mary Lim J:

[1] The plaintiff claims it has not been fully paid for work done for the defendant. The defendant claims that the work done was not only late but defective, requiring remedial work. A counterclaim for costs for such remedial work and related losses was included in the defence filed. This counterclaim was subsequently withdrawn with no costs on the first day of trial. This is how the whole claim arose.

[2] In 1997, the federal government decided to build an institute known as Institut Kemahiran Tinggi MARA ('IKTM') at Vendor City, Taman Industri Kecil dan Sederhana Bersepadu, Tabuh Naning, Malacca. It decided to build this as a turnkey project undertaken by the developers of Vendor City, the defendant. So, on 23 January 2002, MARA awarded this project known as 'Pakej Pembangunan Program Malaysian Institute of Chemical Engineering Technology (MICET), Tabuh Naning, Melaka' ('the project') to the defendant and on 6 March 2002, a formal contract known as the 'Definitive Agreement' was entered into between them. The project comprised several scopes.

[3] The plaintiff was interested in carrying out Scope F which concerns 'supplying, delivering, assembling, testing and commissioning of an IT System for MICET'; and 'the supply, delivery, assembly, testing and commissioning the Fiber Accessories and Rack and Internal Skirting' (Scope F). By letter dated 4 March 2002, the plaintiff quoted for the works under Scope F. The quotation was accepted by the defendant vide letter dated 12 April 2002. The entire Scope F was for the sum of RM13,558,556, comprising the sum of RM12.7m for the IT system, and the sum of RM858,556 for the supply etc of the fiber accessories and the rack and internal skirting. The completion period was 80 weeks from the date of the definitive agreement, that is, by 22 September 2003. It is the plaintiff's case that as of December 2004, it had completed work under Scope F to the value of RM11,021,241.53 but it was only paid RM7,699,279.08. This work was said to have been completed to the best of its abilities. Despite repeated claims for the balance sum of RM3,321,962.45, the defendant failed to settle. By letter dated 13 June 2005 the plaintiff informed the defendant that it was going to stop work and would not carry out the last part of the works relating to the campus management system ('CMS'). And, it stopped work. The present claim is for the balance sum. There is no claim for the CMS works in Scope F.

A

FINDINGS

Is the subcontract a turnkey contract?

B

[4] To succeed, the plaintiff must prove that it has completed the works as contracted. This is usually determined by reference to the terms of the contract in question. In this case, the defendant's letter dated 12 April 2002 which is the letter of award anticipated a formal contract to be drawn up. Unfortunately, it was not. The parties have nevertheless provided in the letter of award that the letter and the specifications will form a valid binding contract. In this, the parties are in accord except that the plaintiff suggests that the plaintiff's letter of offer together with the letter of award forms the contract between the parties. This must be correct as the letter of award itself makes reference to that letter of offer and the specifications. I shall refer to this underlying arrangement as 'the subcontract'.

C

D

[5] In determining whether the plaintiff has proved its claim, Mr Ashok Kumar, learned counsel for the defendant submitted that it was necessary to first of all, appreciate the nature of the contractual relationship between the parties. He submitted that the subcontract was in fact a turnkey contract. According to Encik Mohd Zahari bin Osman ('DW1'), the defendant's ICT executive director at the material time, this was because MARA had appointed the defendant as a turnkey contractor for the project and the plaintiff was appointed on a similar understanding. This is said to be apparent from the terms of the subcontract as found in the letter of award. Mr Kumar also argued that the subcontract was an entire contract in which case the defendant was entitled to insist on the completion of performance before the defendant's obligation to pay arose — see *Bolton v Mahadeva* [1972] WLR 1009, *Viking Grain Storage Ltd v TH White Installations Ltd & TH White Ltd* [1985] 3 ConLR 52 and *KP Kunchi Raman v Goh Brothers Sdn Bhd* [1978] 1 MLJ 89. More so when the work was for a lump sums which was the case here. Since the plaintiff had not completed performance of the entire works under Scope F, the plaintiff was not entitled to its claim.

E

F

G

H

[6] Mr Sivakumar, learned counsel for the plaintiff urged the court to disregard the issue of whether the subcontract was a turnkey contract because it was not pleaded. Alternatively, he submitted that the plaintiff was not a turnkey contractor because according to the plaintiff's principal and sole witness, Encik Ahmad Khalil bin Ali Abul Hassan ('PW1'), the manager of the plaintiff at the material time, the plaintiff was only in charge of a part of the definitive contract. Further, nowhere was it specified that the subcontract was a turnkey contract.

I

[7] In my judgment, the issue of whether the subcontract is a turnkey contract is properly raised. Having examined the defence, especially paras 3, 4, 5, 6, 7 and 13 of the defence, I find that the issue has in fact been pleaded, though not directly. The defendant had alluded to the definitive agreement between the defendant and MARA as a turnkey contract and while there may not be a specific description of the subcontract between the plaintiff and the defendant as a turnkey contract, there are sufficient material facts pleaded to allow the defendant to now describe or refer to the subcontract as a turnkey subcontract. I agree with Mr Ashok Kumar that the question is important as it determines performance of the plaintiff, its level and adequacy as understood and expected by the parties. In a turnkey contract, the plaintiff would be responsible for the entire design and construction of the IT system and the plaintiff is obliged to deliver that system fully operational and in accordance with MARA and MICET's requirements — see Joseph A Huse, *Understanding and Negotiating Turnkey and EPC Contracts*, (2nd Ed), 2002. In view of this significance and the implications of a turnkey contract, there must be clear evidence of that understanding or intention through an express or specific provision to this effect.

[8] This is clearly illustrated in MARA's letter of award to the defendant and the terms of the definitive agreement itself where there are specific references to the arrangement as a turnkey contract. Comparing these two documents with the terms of the subcontract, there is a conspicuous absence of an express description of the subcontract as a turnkey contract. In fact, DW1 admitted that the critical words 'turnkey contractor' do not appear anywhere in the letter of award. Instead, the letter specifically stated that the plaintiff is to perform and complete Scope F subject to the terms and conditions of the contract and its annexure, MARA's requirements, including drawings and specifications, schedules (schedules for equipment, delivery and price) as are determined by the defendant — 'terma dan syarat-syarat kontrak serta lampiran-lampirannya, keperluan MARA, termasuk Lukisan dan Spesifikasi, Jadual-Jadual (Jadual Peralatan, Jadual Penghantaran, Jadual Harga) seperti yang ditentukan oleh pihak kami'. While there is a reference to MARA's requirements, that reference is insufficient to denote that the terms in the definitive agreement also apply to the subcontract. Certainly not to the extent of rendering the subcontract equal to a turnkey contract with its meaning and far reaching implications. The phrase 'terma dan syarat-syarat kontrak serta lampiran-lampirannya' does not actually refer to the definitive agreement but to the formal contract which was yet to be drawn up. And as we know, it was never finally drawn up. Although the phrase, 'Lukisan dan Spesifikasi, Jadual-Jadual (Jadual Peralatan, Jadual Penghantaran, Jadual Harga) seperti yang ditentukan oleh pihak kami' specified in the letter of award affords the defendant the option to decide what constitutes those documents, it cannot be denied that the option cannot be decided in isolation without inclusion of documents prepared by the plaintiff. In fact, it is apparent from the documents in bundle A that the plaintiff's

documents were indeed considered by the defendant at the material time. Without this information, the letter of award confirming price and other matters surely could not have been possible in the first place. All this however, does not and cannot mean that the subcontract is to be treated as a turnkey contract. From these documents though, it is the defendant who is charged with the responsibility of drawing up the IT system, its design and its policy. Consistent with its role as a turnkey contractor, the defendant must have been considered these matters when it quoted its price to MARA. But all this took place before the plaintiff was engaged. The plaintiff merely went into greater detail on these matters.

[9] As such, I am unable to interpret and draw the conclusion that is urged by the defendant. Any knowledge that the plaintiff may have of the nature of the definitive agreement does not per se render the subcontract of similar nature. While the price of this subcontract is a lump sum, the payment of that sum is in installments as can be seen from the payments already made by the defendant to the plaintiff. The same holds true when construing whether the subcontract is an entire contract. Again, I cannot accept the defendant's argument on this. In *Keating on Construction Contracts*, (8th Ed), 2006 at p 101 — 'Whether any contract is an entire contract is indeed a matter of construction. Clear words are needed to bring an entire contract into existence'. In this case, the plaintiff was paid according to the progress of the works. The subcontract was divisible and capable of being assigned into several parts with payments to the plaintiff not dependent on complete performance by the plaintiff.

Performance

[10] Be that as it may, there are nevertheless standards of performance that the plaintiff is expected to meet. Despite a lack of a formal contract, there are sufficient details in the letter of award, specifications and the letter of offer as to the matters that the plaintiff is expected to comply with or the standard of performance expected of the plaintiff. These standards involve meeting 'MARA's requirements, including Drawings and Specifications, Schedules (Schedules for Equipment, Delivery and Price) as are determined by the Defendant'. In relation to external skirting cabling works and skirting works, the plaintiff itself had spelt out the expectations:

(a) The works involved are defined in the specification, the accompanying drawings and cover the followings and/or include any unspecified, undesignated or non-indicated work which may, in the course of the installation become necessary for the satisfactory performance of the installation.

The supply, delivery, installation, testing and commissioning of:

(i) laid in underground ducting and drilling;

(ii) skirting for internal networking system;

(iii) technical drawings which are required and necessary for the proper and complete implementation of the works; and

(iv) project implementation services.

(b) The installation shall be completed and tested as to the requirements of the drawings, specification, Institut Teknologi Kejuruteraan Kimia Malaysia IT MICET and other rules and regulations that are applicable and handed over to the owner in satisfactory condition.

(c) To liaise with KCSB for permission and approval prior to the commencement of work, testing after completion of the installation and handing over after testing.

(d) All external underground pipe ducts required for underground cabling shall be provided and laid under this contract.

(e) GI pipes are to be provided for all road crossings, drains, hardstanding, etc for laying underground cables.

[11] This standard of completion and performance is high and may even be as high as that expected in a turnkey contract. Whether or not this standard has been met is very much dependent on the facts and whether sufficient evidence has been adduced to prove the claim on a balance of probabilities. The burden of proof lies of course, with the plaintiff — *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17; *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25; *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65; *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229. Failure to do so can be fatal or leave the claimant merely to an award of nominal damages.

[12] The plaintiff claimed there is an abundance of evidence showing that both the standard and the level of performance have been satisfied. The plaintiff relied on the defendant's own documents, namely the Health Check Review Report, *Laporan Kemajuan Skop F Sistem IT* as at 17 December 2004, the defendant's letter dated 2 September 2005 to MARA, and the Job scope prepared by the ICT Department of Dulang Corp Sdn Bhd, the company that allegedly took over the plaintiff's work, as proof of its proper completion of the contracted works. In these reports and letters, the plaintiff's work on Scope F was described as either 'successfully implemented' or completed to the level of or 95.5% or 94.4%. The plaintiff also referred to several certificates of provisional acceptances ('CPs') accepted by the defendant and delivery orders as further proof of its claim. It was the contention of the plaintiff that if the works completed by the plaintiff were defective or, if the defendant had indeed terminated the subcontract on 17 December 2004, the CPs, all dated 18 May

2005, should not have been accepted by the defendant. Finally, the plaintiff relied on letters exchanged between the defendant and the Ministry of Finance where the defendant is said to have admitted to part of the plaintiff's claim.

[13] The defendant responded by contending that the plaintiff's works were 'riddled with defects'. Specifically, it was contended that the plaintiff had failed to carry out the works under Scope F with due diligence and had failed to comply with the requirements of MARA and MICET. Despite reminders at meetings of 1 November 2004, 14 December 2004 and 17 December 2004 and through emails, the plaintiff is said to have failed to remedy such failures. The defendant further alleged that the plaintiff suffered an acute shortage of manpower which eventually led to the plaintiff's failure to complete Scope F within the prescribed time or within the extended time for completion. Contrary to the plaintiff's allegation, the defendant contended that it was the party that terminated the subcontract and not the plaintiff as claimed. The termination was brought about when the plaintiff failed to complete by the extended date of 17 December 2004 and when the defendant rejected the plaintiff's application for another extension of three months. The defendant further claimed that as a result of this failure, MARA terminated the definitive agreement on 24 September 2005. Although the definitive agreement was subsequently revived, the defendant alleged that this was not without the defendant suffering losses of RM24,246,906.57 and RM90,271.90 for, inter alia, remedial work and losses to its reputation. This was the counterclaim referred to at the start of my judgment and which the defendant subsequently withdrew. As for the health check review report of 94.4% level of completion for Scope F, the defendant submitted that this was only achieved by the efforts of third parties engaged by the defendant to carry out rectification and remedial work to the plaintiff's defective work. Finally, it was argued that not all goods and services were delivered while some were returned necessitating the deduction of the sums claimed by the plaintiff.

[14] Having heard and examined the evidence, I am not convinced by the defendant's allegations that the plaintiff has not performed to the standards expected in the subcontract. This question is determined not so much by the evidence of the witnesses but by the contemporaneous documents relied on by the parties. Each side's single witness was not entirely helpful as each chose to simply disagree with propositions put to them by opposing counsel. I also noticed that both parties were in fact relying on the same pieces of evidence to support their respective contentions. I will now consider each of them in turn.

[15] First, the health check review report conducted from early November 2004 until December 2004 on the 'computerised systems being developed and installed by the subcontractor'. The health check review report was conducted

professionally by a firm known as Smart System Solution Sdn Bhd. The objectives of this audit called by the defendant were:

(i) To evaluate the delivery of systems against industry standards and best practices

(ii) To assess the adequacy of project management, System Development Life Cycle (SDLC) and security techniques adopted

(iii) To assess MICET's Campus System (MCS), Finance and Accounting System (FAS) and Human Resource Management & Payroll System (HRP) with regards to their readiness for implementation and operational use of MICET's end-user departments

(iv) To assess planning and arrangement toward continued availability systems

(v) To report peculiarities, shortcomings and outstanding issues for subsequent resolution to be taken to continue and complete the project.

[16] In its executive summary of the health check review report, Smart System Solution Sdn Bhd reported that:

> The computerized systems installed at Micet, Melaka is a multi-platform systems implementation catering for different user environment. The IT systems namely, Office Automation, Micet E-Learning, Smart Card and Library Systems were successfully implemented and currently in use by Micet.

[17] The rest of the report then proceeds to give its observations on the various audit issues such as user requirement; user focus groups; general and detailed specific user requirements; detailed specific requirements; implementation plan; project committees; management reporting; systems development life cycle, project management and change management procedure; testing standards; user acceptance sign off; risk management; IT security policy; and on the security/system administration manual. In many of these issues, there were concerns expressed by Smart System Solution Sdn Bhd. For example, on the user requirement on the financial accounting system and human resource and payroll system, Smart System Solution Sdn Bhd remarked that the systems installed by the plaintiff are 'far from ready for live implementation'. But, as in all audit reports, the overall audit conclusions are critical as these conclusions address the very purpose of the audit. In this regard, the executive summary prepared by Smart System Solution Sdn Bhd is extremely instructive:

> However, implementation of the remaining systems, namely, MCS, FAS and HRP was stalled because, unlike the IT systems, the core systems involved elaborate administrative and financial processing attributes.

> The health-check review has shown that despite incomprehensive user requirement establishment the programming functions for each system were carried out in the hope that more necessary processing requirements will be incorporated into the programs as user testing of the system progressed.
>
> This did not materialized as the programming and testing dragged on only gradually and indefinitely. This method of development is contrary to what is preached in the development methodology adopted by the project team.
>
> The programs being developed may eventually be successfully implemented however, predicting the lengths of time taken to complete the development is almost impossible. What is certain is that the current method of development will take much longer than originally projected. More trial and error situation will take its toll on time, programming and user resources.
>
> Should the question of time is of essence, the current development project should be revamped or replaced.

[18] From this, it is reasonable to conclude that while there may well be pockets of concern, Smart Solution Sdn Bhd was actually more concerned with the defendant, the turnkey contractor's 'timely completion of the project in fulfilling all user requirements'. The systems installed and implemented by the plaintiff were successful but there was uncertainty as to the readiness of the remaining core systems for implementation because these systems involved 'elaborate administrative and financial processing attributes'. According to PW1, those systems were not within the scope of its works.

[19] Second, there are the two separate letters that the defendant wrote to MARA on the progress of Scope F. In both these reports, Scope F was reported as at least 94.4% completed. Although the defendant's report, 'Laporan Kemajuan Skop F Sistem IT' on the status of Scope F as at 17 December 2004 was a pre-meeting report as opposed to the actual meeting notes of the same date where this detail is significantly left out, this is immaterial as the report is nevertheless the defendant's own document. The contents of the report were prepared by the defendant. In this report, the defendant itself stated that 95.5% of Scope F had been completed:

> Purata kemajuan kerja-kerja skop ini pada keseluruhannya adalah 95.5% (sila rujuk status lengkap di Lampiran 1). Kerja-kerja mendapatkan pengesahan terakhir (*Final Acceptance*) dari pihak MARA dan MICET akan disempurnakan tidak lama lagi.

[20] It is important to bear in mind that at this point, the plaintiff was still very much the party charged with the responsibility of Scope F. There was as yet no talk of any termination of the subcontract by the defendant and certainly, no other party had been engaged to rectify or complete the plaintiff's work. In the defendant's other letter dated 2 September 2005 to MARA, the defendant also advised MARA that Scope F was 94.4% completed:

Status keseluruhan Skop Sistem IT

Status kemajuan kerja Skop ini adalah 94.4% dari keseluruhan kerja tetapi MARA hanya membayar sebanyak 79% (RM11,370,578.93 dari RM14,400,000.00) sahaja.

[21] Therefore, from the defendant's own evidence, the plaintiff has indeed successfully completed a substantial part of Scope F, be it 94.4% or 95.5%. Then, there are the two letters sent by the defendant to the Ministry of Finance. What happened was after the defendant failed to pay, the plaintiff stopped work after informing the defendant of its intention to stop work in the event it did not receive payment. As this turnkey contract was a project of the federal government, the plaintiff sought the assistance of the Ministry of Finance for the recovery of its unpaid claims from the defendant. In its reply dated 13 January 2006 to the ministry's letter dated 20 December 2005, the defendant explained that the non-payment was due to non-delivery of certain items and discrepancies in the plaintiff's claim and the defendant's audited figures. It then proceeded to attach audited figures where a sum of RM1,985,300.60 was set out to be the 'balance to be received' by the plaintiff. From the tone of this letter, there is every indication of preparedness on the part of the defendant to pay that sum mentioned once the new contract with MARA was drawn up and its terms and implications are examined. The defendant clearly stated that it will 'seterusnya membuat pembayaran kepada AK Translogic Sdn Bhd', the plaintiff. When the defendant failed to pay, the ministry inquired again, this time about deductions made by the defendant for 'support staff', 'maintenance hardware; not delivered item'; and 'OA system and remaining maintenance payments to vendors'. What is insightful is in its letter dated 22 August 2006, the Ministry quoted the defendant to have 'memperakukan' or recommended the payment of RM1,985,300.60 vide its letter dated 16 August 2006 which it urged the defendant to pay early. Although this second letter was not available, I note that this sum is the same amount as that advised by the defendant itself in its earlier letter of 13 January 2006. In my judgment, these letters unreservedly puts the defendant in the position of having admitted to the sum of RM1,985,300.60. With respect, I do not agree with learned counsel for the defendant's contention that the agreement to pay was only in principle or subject to any pre-conditions. There is no evidence to support such suggestions.

[22] Next, the defendant's assertion that the 95.5% or 94.4% completion was made possible by Dulang Corp Sdn Bhd, the third party that was engaged to rectify the plaintiff's defective work and complete Scope F is not supported by the evidence before the court. In this, I am confining myself to the appointment of Dulang Corp Sdn Bhd since the second company, Pernac Technologies Sdn Bhd was only appointed on 5 October 2005, long after the plaintiff had withdrawn from the subcontract; and its works relate to the CMS

aspect of Scope F which is not part of this claim. More importantly, the defendant has withdrawn its counterclaim which includes monies incurred from rectification works done by these subsequent contractors. From its letter of award, Dulang Corp Sdn Bhd appears to have been engaged some time on 1 June 2005. As mentioned earlier, the defendant was already reporting to MARA of a 95.5% level of completion as at 17 December 2004. Yet, the ICT Department of Dulang Corp Sdn Bhd reported in its job scope of a 94.4% level of completion as at 22 August 2005:

> Jika dinilai dari keseluruhan status Sistem IT Skop F adalah 94.4% (sehingga 22 Ogos 2005) dari keseluruhan Sistem IT. Baki tersebut kebanyakkannya melibatkan penyediaan aplikasi CMS yang mana aplikasi ini telah dibekalkan kepada pihak UniKL MICET tetapi tidak diterima oleh pihak MARA … Oleh dengan itu, kami perlu menyediakan aplikasi lain untuk UniKL MICET.

[23] In its job summary (p 374 of bundle A), Dulang Corp indicated that it was 'Responsible for projects involving the development, system delivery and implementation, maintenance, system tests, feasibility study and upgrading of computer systems'. There is no mention of any rectification or remedial work required on defective work done by the plaintiff. According to DW1, rectification works was part of the letter of award to Dulang Corp but it is not spelt out 'on the surface'. Having examined the 'surface' as well as the contents of the letter, with respect, I cannot accept the defendant's claim. I do not see how it can be said that Dulang Corp Sdn Bhd was engaged in December 2004 or that it was engaged to carry out remedial or rectification work. In the circumstances, I am also constrained to reject the defendant's claim that the work done by Dulang Corp Sdn Bhd involved rectification work. While the plaintiff attempted to suggest that the defendant was somewhat involved in both Dulang Corp Sdn Bhd and Pernac Technologies Sdn Bhd as they are related companies, I do not see any relevance to this immediate issue of whether either of these companies did work to remedy the defective work of the plaintiff.

[24] It is further difficult to accept that the defendant had repeatedly informed the plaintiff of defective work and had called upon the plaintiff to remedy the same. DW1 testified that complaints of defective work were communicated to the plaintiff orally but this was denied by PW1. If what DW1 testified is indeed the case, I would have expected to see written follow up if the remedial works were not carried out by the plaintiff, especially if there was persistent failure to remedy after being so informed. This is surely a serious complaint meriting some record of the same. There is no record of any correspondence or any other contemporaneous documents to this effect. Once again, the defendant's allegation cannot stand.

[25] The defendant cited internal problems of the plaintiff as evidence of

defective and delayed work. PW1 was not present if not daily, then regularly at the project site. It was also alleged that the plaintiff relied on third parties, Frontline to install the system on a piece meal basis without taking into account the quality of the system on a long term basis. In my view, the absence of PW1 during the currency of the works as pointed out in the internal memorandum at p 280 of bundle A dated 14 January 2004 and the engagement of frontline do not appear to have any impact or detrimental effect finally on the progress and completion of the works and the quality of that completion. This is because once again, both the health check review report and the *laporan kemajuan* reported in the later part of the year, November and December 2004 to be precise, that the works were already 94.4 to 95.5% completed. This was long after the absence of PW1 and the involvement of frontline were first brought up. These matters must have been addressed for this level of completion and performance to be achieved.

[26] I am fortified in my conclusions when the note dated 1 November 2004 to a meeting on 30 October 2004 between the defendant's DW1 and the *pengurus besar* IT is examined. In this note, it can be seen that although the whole system had been delivered and installed, the owner (MARA and MICET) was not satisfied with certain aspects of that system as developed and supplied by the defendant. That system could not or was not capable of being integrated into other systems, either existing or of MARA/MICET with other institutions. Again at another meeting on 17 December 2004, MARA and MICET indicated its dissatisfaction with the defendant, the 'Pembekal'. Undisputedly, the defendant is the 'Pembekal'. Both MARA and MICET were aware at the material time of the presence of the plaintiff and its role in the project and the minutes of meetings confirm this. Yet, it did not attach any blame or made any adverse comment on the plaintiff. On the contrary, in this note, the *pengurus* IT urged the defendant to settle the outstanding payments to the plaintiff so that the plaintiff could carry on with the remaining work and deliver items hitherto suspended.

[27] From these and other records, it can be readily concluded that the problems that beleaguered the project was really due to the design of the IT system and its policy in that it was unsuitable or did not meet user requirements. In fact, the defendant through DW1 acknowledged at the meeting of 17 December 2004 with MARA that the IT system that it installed could not be used and that it would replace that system with another — see p 255 of bundle A. Since the defendant is the turnkey contractor, the defendant is responsible for ensuring that these deficiencies are overcome. The unsuitability of the system and the attendant problems cannot be assigned to the plaintiff.

[28] According to DW1, the terms of payment between the parties were

based on the issuance of the certificate of provisional acceptance which is MICET's confirmation that an item has been received in good order and condition and conformed to the technical specifications as ordered and that the installation required had been completed by MICET. It is observed that the Certificates of Provisional Acceptance IT Systems; Contract Code state:

> This is to confirm that the items(s) in contract code … have been delivered on November 30, 2003 and have been received in food order and condition and the equipment(s) supplied conforms to technical specification as ordered and the installation required has been completed by the beneficiary.

[29] These certificates were all provisionally accepted by MARA's representative and witnessed by the defendant. These certificates, all dated 18 May 2005 were for work completed or delivered on 30 November 2003. The defendant's suggestion that the acceptances to date were only in respect of delivery acceptances or physical delivery acceptances and not final acceptance by MARA of the functional specifications of the items in the delivery orders is not tenable in view of all this evidence. I observed that there were opportunities aplenty for the defendant to dispute the quality of work including the matter of delay, certainly by 2005. Yet, the defendant did not. The first completion date was September 2003 and by November 2003 the defendant was in the position to assess and complain about the quality or lack of quality in the plaintiff's work. I can only surmise that there were no complaints. The quality and level of completion of work by the plaintiff must have been as reported in the health check review report and the *laporan kemajuan* dated November and December 2004 respectively. Since payment terms between the plaintiff and the defendant was based on progress of work, even if the subcontract was an entire contract, there is clear proof that the plaintiff had completed substantial work to which it was entitled to payment. I can only conclude from all these findings that the performance of the plaintiff accords with the expectations under the subcontract.

Quantum — deductions

[30] Before dealing with the substantive issue of quantum, there is the matter of termination. The defendant submitted that it had orally terminated the subcontract at a meeting on 17 December 2004. With respect, I must also reject this claim as there is no record or evidence of such termination by the defendant. If there was a termination, it would be reasonable to expect the defendant to alert all present at the meeting on 17 December 2004 and to see that a note to this effect is inserted in the minutes. After all, termination is undeniably a critical and major event affecting parties' rights and dealings. Instead, the minutes show the meeting with MARA concluded with homework not only for the defendant but also, the plaintiff. If indeed there was termination by the defendant in December 2004, it would be reasonable to

suppose that MARA and MICET would be aware of the same. However, in response to the plaintiff's letter dated 13 June 2005 concerning its proposal to stop work, MICET vide letter dated 27 June 2005 appealed to the plaintiff to reconsider its decision. Again, if the subcontract had been terminated on 17 December 2004, it strikes me as somewhat odd that the defendant left it for another six months, till June 2005 to appoint another subcontractor. I also observe that in its letter dated 13 January 2006 to the Ministry of Finance, the defendant indicated that the plaintiff had 'menarik diri dari projek ini dan terdapat beberapa item di dalam BQ yang tidak dihantar'. The defendant did not refer to any termination of the subcontract or even cite any defective or delayed works by the plaintiff. The defendant's own conduct clearly does not support its own contention.

[31] In contrast, the defendant's refusal or failure to pay despite being urged by MARA and the many requests of the plaintiff is a failure to perform as agreed under the subcontract. Hitherto, the defendant had been paying the plaintiff according along progress payments and upon presentation of the certificates of provisional acceptance. It is, in my view, reasonable to infer from the defendant's conduct that it has no intention of paying the plaintiff. That failure or refusal is an act of repudiation. The plaintiff, as the innocent party, there being no evidence of defective or delayed work which has not been accepted by the defendant or MARA, can either insist on the continuance or performance of the contract or; to terminate the contract. It chose to terminate the contract. In *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448, the issue was whether there was a right to suspend performance by the innocent party in the event of non-payment by the other party to the contract. In the absence of express provisions to such effect, the plaintiff has to opt for either performance or termination in the event of such repudiatory breach. There is no right to suspend. In the facts of this case, the plaintiff was not seeking to suspend but to stop. The failure to pay is a material breach which gives the plaintiff the right to treat that repudiation as accepted and to bring the subcontract to an end. The plaintiff cannot be expected to go on indefinitely, uncertain of payment from the defendant. With these further findings, the defendant's contention on termination cannot be accepted.

[32] Moving on to the issue of quantum, I observe that the submissions focused on the deductions made by the defendant towards the total sum claimed. There is actually no issue with the mathematical calculations. It is the principle upon which the sum is claimed or the deductions made. The defendant made deductions for seven items totaling a sum of RM3,873,976.32. The deductions were for non-performance and because the defendant considered the subcontract as terminated in December 2004. In fact, the defendant contended there was over-payment.

[33] Of these seven deductions, the plaintiff claimed the deductions for items 1, 2, 3 and part of 4 comprising charges for overlapped items with Scope C, CMS, KIV items and part of staff payments were proper or 'legitimate'. However, the deductions for part of the staff payments, maintenance for hardware, undelivered items and for the office automation system were challenged. It was submitted that the total deductions ought to have been a sum of RM2,537,314.47 and not RM3,873,976.32. That being so, a sum of RM1,336,661.85 was due for the wrongful deductions. Together with the admission of RM1,985,300.60 as found in the defendant's letter to the Ministry of Finance, the claim of the plaintiff for RM3,321,962.45 was therefore said to have been proved. In response, the defendant submitted that the questionable credibility of PW1, the insufficient evidence adduced and that it was the work of third parties engaged by the defendant to rectify the plaintiff's defective works all show that plaintiff's claim has not been proved.

[34] Having scrutinised the statement of deductions (p 346 of bundle A) and reading it together with the health check review report, I find the deductions improper and not supported by the available evidence. These are my reasons.

[35] The plaintiff had invoiced the defendant for the total sum of RM11,021,241.53 for work done up to 2005. The invoices seen at pp 400–404 were dated between 26 July 2002 for RM633,500; 14 November 2002 for RM225,056; 16 September 2003 for RM5,255,399.30; 14 February 2004 for RM1,362,383.46; and 15 February 2005 for RM351,517.73. A summary of the invoices dated 16 February 2005 for RM3,321,962.45 (p 405) was also issued. All these invoices show work done before the plaintiff's termination in June 2005. In these deductions, the issue of quality or level of performance or defective performance does not arise. It is a case of non-performance or non-delivery. Since the health check review report, certificates of provisional acceptances and the delivery orders confirmed the delivery of hardware and the relevant systems and the execution of these works, and in view of my earlier finding that the subcontract was not terminated by the defendant in December 2004 but by the plaintiff in June of the following year, the deductions for these items are wrong. During this period, the hardware and systems installed were maintained by the plaintiff and it is proper for the plaintiff to charge for the same. The deployment of a sufficient number of staff commensurate with the level of activity at that time is to be expected. The imposition of such costs as claims against the defendant is therefore appropriate. In the defendant's statement of deductions, a deduction for RM263,680 for staff payments was recorded. Yet, the defendant finally deducted a sum of RM462,540 for this item of claim. There is no explanation forthcoming from DW1. Further, in view of my earlier findings on the

plaintiff's level of performance which is proved through the defendant's own records and DW1's testimony, I find that the plaintiff's claim for these sums justified.

[36] In the circumstances, I am satisfied that the plaintiff's claim has been proved on a balance of probabilities and I hereby allow the plaintiff's claim as prayed at para 23(a) together with interest at the rate of 4%pa from the date of filing to the date of judgment and thereafter at the rate of 8%pa till the date of realisation together with RM100,000 as costs. Learned counsel for the plaintiff and the defendant had proposed respectively in their submissions the sums of RM150,000 and RM100,000 as reasonable costs.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan